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## Access to information and the fourth wave of rights

MICHAEL RIEGNER — 27 April, 2018



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The Inter-American and the European Court of Human Rights, the UN Human Rights Committee, the European Union, Germany, India, South Africa, and Brazil all share one common legal feature: They have recognized “access to information” as an individual fundamental right since the turn of the millennium. Since the 1990s, there has been a veritable “global explosion of freedom of information” as new constitutions have enshrined the right to information, legislators have enacted access to information acts, and courts have enforced and expanded individual guarantees to seek information from public authorities. Proponents argue that access to state-held information empowers citizens for the information age, perfects democracy and promotes development. The enthusiasm about access to information (ATI) is echoed in a burgeoning body of scholarly literature, which culminates in the claim that freedom of information is part of a fourth wave of rights, equivalent to civil, political and social rights.

This post summarizes some of the findings of a journal special issue of “Law and Politics in Asia, Africa and Latin America”, which takes stock of existing ATI research and critically investigates the achievements and failures of the right to information. This post argues that ATI should be understood as a multi-level and multi-functional guarantee, which has emancipatory potential to shift power relations in individual cases but is less effective in destabilizing entrenched power structures and inequalities.

## **The right to information as a multi-level guarantee**

From the perspective of legal doctrine, freedom of information has evolved from a legislative guarantee in a handful of countries into a globalized, multi-level right enshrined in legislation and constitutions around the world and recognized as a human right in international law. Currently, more than 60 constitutions recognize ATI as a fundamental right, the majority of them in the Global South. A spectacular success is attributed to ATI activism in South Africa: Investigative journalists used access requests to uncover misspending of public funds on president Jacob Zuma's private property, leading to his conviction by the Constitutional Court and precipitating his eventual political demise by the African National Congress (ANC) in early 2018.

As ATI expanded in national law, it also gained increasing recognition in international human rights law. "Freedom of information" has evolved from a sub-component of the right to freedom of expression into a self-standing right of access to state-held information. At the same time, ATI has expanded from a negative right, subject to an obligation to respect, into a positive right imposing a duty on the state to fulfill the right by way of disclosing government-held information. ATI thus transcends the porous boundary between civil-political and socio-economic rights and mirrors the wider trend from negative to positive rights in international human rights law.

In 2006, the IACtHR became the first international court to recognize access to state-held information as a human right. Since then, the case of Reyes v. Chile has become the leading case on ATI around the globe. The IACtHR held that Art. 13 ACHR "protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case."

The Human Rights Committee initially hesitated but eventually followed suit in General Comment No. 34 on freedom of expression issued in 2011. The new text opines that Art. 19(2) ICCPR "embraces a right of access to information held by public bodies" and recommends that states "enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation". In comparison, the ECtHR has pursued a more restrictive interpretation of Art. 10 ECHR, whose wording protects the freedom

“to receive and impart” information but not “to seek” it.

### **The right to information as a multi-functional guarantee**

ATI is associated with a series of theoretical justifications and social functions that relate to its democratic potential and its nature as a leverage right that shifts power relations between citizens and unresponsive state agencies. A context-sensitive comparison indicates, however, that ATI performs multiple functions in different legal and political contexts. It not only regulates relationships between individual citizens and the state, but is also used by journalists and opposition parties in the absence of strong laws protecting the media or parliamentary minorities. In international law, it may empower international institutions to enforce transparency on member states and to motivate citizens for decentralized enforcement of international norms. Effective ATI laws can also have the function of avoiding leaking and whistleblowing. Whether ATI's functional objectives are actually achieved in practice, is an empirical question in need of socio-legal research.

### **Does ATI make a difference?**

A precondition for having real-world impact is that ATI is implemented effectively in practice. This can be tested to some extent with statistical data about the number and success rates of requests for information. The question of whether ATI law shifts power relations and improves democracy is more difficult to measure. We know from empirical law and society research that the haves tend to come out ahead in legal reform efforts unless the have-nots are specifically empowered to actually exercise their rights. Indeed, user statistics from the US show that the most frequent users of ATI in the USA are corporations, not citizens. On the other hand, well connected business interests may have privileged access to information anyway, and ATI thus level the playing field at least to some extent.

Ethnographic studies from a range of countries make it seem plausible that that ATI has at least some leverage effect where obstacles to effective implementation can be overcome with the help of institutional and societal support structures. The Zuma case is illustrative in this regard: Political accountability ultimately resulted from a combination of ATI activism by professional journalists, formal litigation in the constitutional court, public pressure from media, and political competition within the ANC. Overall, however, empirical findings on ATI suggest that it is more likely to shift power relations in

individual cases than to destabilize entrenched power structures. Perhaps the most intriguing sign that ATI upsets power relations but not power structures is the fact that information seekers increasingly face backlash from the powers that be: More than ten attacks on information requesters were reported in 2010, and at least five have been killed since then. If ATI constitutes a fourth wave of rights, riding this wave is a risky affair.

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This post continues our cooperation with our journal partner "[Law and Politics in Asia, Africa and Latin America](#)", which just published a [special issue](#) on "The right to information".

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